

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Petition for Declaratory Relief)
in the form of Clarification of) RM-7984
Section 317 of the Communications)
Act of 1934 Regarding Sponsorship)
Identification Announcements for)
Infomercials)

OPPOSITION OF THE
NATIONAL ASSOCIATION OF BROADCASTERS
TO PETITION OF THE CENTER FOR THE STUDY OF
COMMERCIALISM, ET AL.
FOR DECLARATORY RELIEF

The Center for the Study of Commercialism, et al.
("Petitioners") have petitioned the Commission for a
declaratory ruling that continuous sponsorship
identification be required during program length
"infomercials," or, in the alternative, for a rulemaking to
the same effect.^{1/} The National Association of
Broadcasters, ("NAB"),^{2/} opposes this petition. Current
practice of sponsorship identification in infomercials, as
reflected in the guidelines of the National Infomercial
Marketing Association, ("NIMA"),^{3/} includes display of
sponsor identification at the beginning and end of the

1/ Petition of Center for the Study of Commercialism, et al., RM-7984, filed January 3, 1992.

2/ NAB is a non-profit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and all the major networks.

3/ NIMA represents over 110 firms associated with the infomercial industry, including all major producers of infomercials. Approximately 75 percent of infomercial producers are currently NIMA certified.

infomercial, as well as before each direct purchase opportunity. This current industry practice provides adequate sponsorship identification of infomercials, and, in fact, goes beyond both the letter and the spirit of Sec. 317 of the Communications Act. The Commission should not here entertain the unnecessary and potentially stifling regulation requested by Petitioners.

I. INTRODUCTION

Petitioners' request for continuous sponsor identification during program length infomercials seeks unnecessary regulation of the emerging format of infomercials. NAB opposes this request for continuous sponsor identification for several reasons. One, current sponsorship identification practice and current application of Sec. 317, coupled with viewer familiarity with the infomercial format, provides adequate identification of infomercial sponsorship. Two, we believe that a new program format should not be unnecessarily burdened with government regulation. Three, the Federal Trade Commission is actively and appropriately policing the infomercial industry, particularly with regard to misleading "format."

Current infomercial sponsorship guidelines, set forth by NIMA and followed by today's infomercials, require that a sponsor identification precede each direct purchase opportunity in the infomercial and that such identification

occur at the beginning and end of the program.^{4/} Such sponsor identification puts the consumer on notice of the actual sales portion of the infomercial, as well as the sponsored nature of the entire program, and comports with the FTC's requirements for infomercial remedial action. A continuous label of "advertisement" during the entire program, as suggested by petitioners, well could distract from, and even undermine, the informative programming also presented in infomercials. Current practice of sponsor identification at the beginning and end of the infomercial and before the direct sales pitch in infomercials satisfies both the letter and the spirit of Sec. 317 and the Commission's rules.

II. ADEQUATE AND APPROPRIATE SPONSORSHIP IDENTIFICATION OF INFOMERCIALS IS BEING PROVIDED BY CURRENT INDUSTRY PRACTICES AND BY FTC ENFORCEMENT POLICIES

As the infomercial industry has developed and grown, industry-wide practices and policies have emerged. These practices are reflected in the NIMA guidelines, which have become a source of reference for infomercial producers and broadcasters alike. FTC policing of potentially misleading infomercial formats also leads infomercial producers to include appropriate sponsorship identification. The advertising industry's interest in integrity and honesty in advertising is another impetus to the infomercial industry's providing effective sponsorship identification.

^{4/} National Infomercial Marketing Association Guidelines, New York: National Infomercial Marketing Association, 1991.

- A. The FTC is actively policing infomercials that are potentially misleading or deceptive as to format or product claims.

The FTC monitors infomercials for misleading or deceptive claims as part of their overall ad monitoring campaign.^{5/} The FTC successfully sanctioned fraudulent and deceptive claims made in some early infomercials, and, in doing so, set out its current guidelines for remedial sponsorship identification practices, which require disclosure at the beginning and end of the program and at each direct sale opportunity.^{6/} The FTC stated in 1990 that it believed the frequency and format of paid advertising disclosures used by infomercials to be adequate.^{7/}

The FTC directed its focus to industry self regulation and consumer awareness as a means of avoiding consumer deception. In the two years since this FTC statement, industry self-regulation has indeed tightened. NIMA guidelines have been instituted, as have been many broadcaster acceptance policies.^{8/}

^{5/} Statement of the Federal Trade Commission before the Subcommittee on Exports, Tourism, and Special Problems of the House Committee on Small Business, May 18, 1990, p. 10.

^{6/} See, e.g., Twin Star Productions, Inc., 55 Fed. Reg. 17,494 (1990).

^{7/} Statement of the Federal Trade Commission before the Subcommittee on Exports, Tourism, and Special Problems of the House Committee on Small Business, May 18, 1990, p. 15.

^{8/} For example, the seven Fox owned and operated stations have infomercials prescreened by Fox's legal staff in New York, where they are checked for content, including adequate sponsorship identifications. Final acceptance of the infomercial lies within the discretion of the local program

So too, consumer awareness of the infomercial format has also reached a much broader level. With over 90% of television stations now carrying infomercials,^{9/} and with the popularity of direct marketing formats, such as Home Shopping Network, consumers are alert for media direct sales formats, and are adept at discerning the infomercial format from other types of programming.

Today, the FTC recognizes the valuable role played by infomercials in the current media marketplace. Deborah Owen, an FTC Commissioner, stated in her comments to a recent NIMA seminar that "the unique construct of the infomercial provides greater opportunities for business to explain their products, and for consumers to learn about them in a convenient manner."^{10/} Ms. Owen went on to note that the "Commission's treatment of infomercials reflects the view that infomercials are a legitimate, beneficial form of protected speech, which is subject to the same rules for truthful ads that apply to other forms of ads."^{11/} The FTC actively pursues those infomercials that do violate

director.

9/ Comm. Daily, Feb. 1, 1991 at 10.

10/ Remarks of Deborah K. Owen, Commissioner, Federal Trade Commission, before the National Infomercial Marketing Association Seminar, June 5, 1992.

11/ Id.

advertising standards, including those with a deceptive format.^{12/}

B. Current industry practices include adequate sponsor identification.

The infomercial "industry" has developed quickly into a high quality and popular format, now used by increasing numbers of "traditional advertisers." It has, just as quickly, adapted industry practices as to sponsorship and format identification that adequately inform views of "sponsorship." Viewers' familiarity with the infomercial format further alerts them to "sponsorship" of programs they may "join" in progress.

NIMA tailored its guidelines for sponsorship identification to reflect the infomercial industry's need to comply with federal rules and regulations, but also to promote "public confidence in the accuracy and reliability of infomercial programming."^{13/} These guidelines call for each infomercial to be preceded and concluded with a clear and conspicuous announcement that the program is a paid advertisement, with the same announcement also occurring before each product ordering opportunity. Implementation of the guidelines typically result in five sponsor identifications within a thirty minute program. The guidelines state that no programs will be produced which are

^{12/} See, e.g., In Re Synchronal Corp., et al., Docket No. 9251; TV Inc., et al., 55 Fed. Reg. 20, 193 (1990); JS&A Group, Inc., et al., 53 Fed. Reg. 44, 014 (1988).

^{13/} NIMA, supra at n. 4.

"likely to mislead reasonable consumers with respect to the nature of the program."^{14/}

Infomercials that do not comport with the NIMA guidelines do risk meaningful penalties. NIMA members are certified in their compliance to NIMA guidelines, and willful violations of the guidelines is a basis for expulsion from NIMA. Broadcasters are aware of NIMA certification standards, and are provided lists of NIMA members in good standing. An infomercial producer who is not NIMA certified may meet opposition from broadcasters who may be reluctant to carry programming that is not industry standard.

Those infomercials that do not follow NIMA guidelines and that do not otherwise contain meaningful or obvious identification of sponsorship^{15/} likely will be rejected by broadcasters or subjected to an FTC or FCC enforcement action. Infomercials not adequately identified or recognizable as to sponsorship are simply not the norm and do not justify an industry-wide rulemaking or new regulation.

^{14/} Id.

^{15/} There are no doubt examples of infomercials that are considered by individual broadcast clearance personnel to be so obvious as to the fact and identity of sponsorship that no more than one actual sponsorship identification announcement is required. In such cases the one sponsor identification required by the FCC's rules would be adequate and requiring even NIMA's minimum would be unnecessary.

- C. Infomercials reflect advertisers' vested self-interest in presenting their products in a truthful and reliable manner.

Infomercials are a vehicle by which advertisers communicate in-depth information about the value and quality of their products to interested potential consumers. With large and established manufacturers now entering the infomercial market, such as General Motors and Volvo, the quality and integrity of the infomercial format continue to rise. Advertisers acknowledge the sophistication of today's consumer, and the popularity of the infomercial format testifies to the consumer's growing demand for increased product information, which allows them to make discriminating market choices.

The rise of the infomercial format, and its acceptance by "traditional" advertisers, will further strengthen self-regulation of the program length commercial. Organizations such as The American Association of Advertising Agencies have strict guidelines regulating the content of advertising, because they recognize that false and deceptive advertising is detrimental to everyone involved in the process of marketing legitimate goods and services.^{16/} The combined effect of self regulation by advertisers and the FTC's current regulation of infomercials gives infomercial producers sufficient reason to guarantee

^{16/} See Testimony of Harold A. Shoup, Executive Vice President, American Association of Advertising Agencies, before Subcommittee on Regulation, Business Opportunities and Energy of the House Committee on Small Business, May 18, 1990.

that their viewing audience does not misinterpret the nature of the selling format. Further regulation by requiring continuous sponsor identification, or otherwise, is not necessary to achieve the goal of truthful advertising and informed consumers. It would be, in fact, oppressive "over-regulation."

**III. THE REQUESTED REGULATION IS EXCESSIVE,
AND IS NOT APPROPRIATE FOR THE EMERGING
FORMAT OF INFOMERCIALS**

A continuous advertising label during an infomercial would be an extreme response to a non-problem perceived by petitioners in current FCC regulations. Infomercials are marketing tools that are proving valuable to marketers and consumers alike. As the format becomes honed by increased experience and competition, the informative value of the program is increasing in response to consumer demand. The direct sales pitch of an infomercial is typically preceded by a sponsorship identification. Today's media viewers are sophisticated and discriminating. They do not require a patronizing form of "protection" as though they were children unaware of the sponsored nature of the now easily-recognizable format of infomercials. Infomercials are thriving because of the positive consumer response to the format, and infomercials are evolving to better service consumer demands for more information.

The Commission's 1984 television deregulation Order emphasized the need for evolving forms of programming

which are defined and regulated by the market. In eliminating the commercial guidelines for television, the Commission noted that it wished to thereby foster "innovative and detailed commercials" and also avoid possible First Amendment concerns over a regulatory "chilling effect on commercial speech."^{17/} The Commission placed its faith in the market to self-regulate commercial levels.^{18/}

Continuous sponsor identification would undermine certain purposes of television deregulation, such as the value of market self-regulation and the need for innovative programming. Further regulating infomercials could stifle the development of the "innovative commercials" the television deregulation Order intended to promote. What was formerly a derided and illegal program length commercial has evolved into a popular, useful hybrid format, combining information with product promotion. "Branding" infomercials with a warning - like an "advertisement" label continuously displayed on the screen-well would be off-putting to viewers who already understand that they are watching a "sponsored" product promotional show. The infomercial is still adjusting and conforming to the interests and needs of consumers. This new type of programming needs further room to evolve, rather than the restrictions that "regulation

^{17/} Report and Order in MM Docket No. 83-670, 98 F.C.C.2d 1076 (1984).

^{18/} Id.


advocates" like the Center for the Study of Commercialism would have the Commission adopt.

IV. CONCLUSION

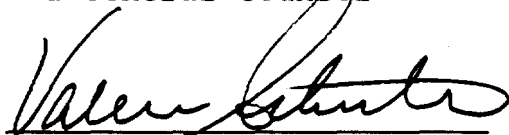
The National Association of Broadcasters urges the Commission to deny petitioners' request for a declaratory judgment or rulemaking proceeding on the issue of sponsor identification in infomercials. Continuous sponsor identification would be an unnecessary and excessive burden on the emerging infomercial format. Current practice in the infomercial industry, backstopped by the FCC's current sponsorship identification rules and by active FTC deception actions, provides adequate sponsorship identification of the sponsorship of infomercials to today's viewers.

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS



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